

JANUARY 24th, 1763

ANSWERS

FOR

ALEXANDER BLACKWOOD Mer-
chant in *Edinburgh*,

TO THE

Petition of *John Cathcart* Merchant in
London.

THE Petitioner *John Cathcart*, was the eldest Son and
Heir of *David Cathcart* of *Glendusk*, a Gentleman
possessed of a small Estate in this Country. The
Petitioner was educated in *Scotland*, and resided here
for above 30 Years from his Infancy, and during the last 18
Years thereof, was a Dealer in Trade from *Glasgow* to *Holland*,
but afterwards removed to *London*, where about, or before the
1726, he entered into a Co-partnery Trade with *John Black-
wood*, which they carried on for many Years. The Situation
of the Company's Affairs, made the Partners have frequent
Recourse to the Friendship of the Respondent for supporting
their Credit, which he exerted towards them in a very emi-
nent Degree. Besides a separate Debt of 700 l. Sterling,
which Mr. *John Blackwood* contracted to the Respondent, and
every

*This I know
nothing of*

This none

*NB all the Debts of the ~~partner~~ were occasioned by the
Circulation of Bills with Douglas with which Mr. Cathcart
was not concerned*

every Farthing of which is still outstanding, the two Partners became jointly Debtors to him in the following considerable Sums.

15th Sep.
1739.

1mo, Of this Date, the saids *John Cathcart* and *John Blackwood*, granted a joint Bond to the Pursuer in the *English* Form, conditional on Payment of 553 l. 15 s. 3 d. *Sterling*. This Debt was created by the Respondent's becoming bound to one *George Fryar* of *London*, for a Debt of the Partners to that Extent; and at settling *Accompts* upon the 24th *July* 1744, there remained a Balance, (bearing Interest) of 53 l. 18 s. 2 d. *Sterling* due to the Respondent.

9th June,
1744.

2do, The saids *John Cathcart* and *John Blackwood*, granted to the Respondent another joint Bond after the *English* Form, for the Sum of 592 l. 16 s. *Sterling*, bearing Interest at the Rate of 5 per cent.

And 3tio, The said Partners granted their joint Bond also in the *English* Form, to the now deceased *Thomas Blackwood* Merchant in *Edinburgh*, for the Sum of 612 l. 11 s. 9 d. *Sterling*, bearing Interest at 5 per cent. This Debt was by a fitted *Accompt* between them and *Thomas Blackwood*, restricted to a Balance of 171 l. 10 s. 10 d. *Sterling*, due upon the 11th of *July* 1737, and bearing Interest from that Day. To this Balance and Interest, the Respondent derived Right from the said *Thomas Blackwood*, by a testamentary Deed in his Favours.

The Respondent being thus Creditor to the Partners to so great an Extent, and for the most onerous Causes, had good Reason to expect that they would have exerted themselves to prevent his being Loser by them. Yet, notwithstanding his Endeavours to support their Credit, their Affairs became gradually more unpromising and involved. In the 1740, Mr. *Cathcart* the Petitioner obtained the Office of Director of the Hospital, in the Expedition to the *West Indies*, under the Command of the late Lord *Cathcart*. His Commission intituled him to no less than 1 l. 5 s. of daily Pay, besides very considerable Perquisites.



quisites. In that Station he continued till his Return to *London* in the 1743, when he was put upon Half Pay for Life, but since Commencement of the present War he has again entered on full Pay. The Petitioner has repeatedly boasted of his having from the 1740 to the 1745, paid off Debts to the Extent of 2092 *l. Sterling*. This may, or may not be true, for ought the Respondent knows; but certain it is, that neither he nor his Partner were at any Pains to do Justice to the Respondent, whose large Debts were still left unsatisfied. At length, in the 1745, the Partners stopt Payment altogether, and a Commission of Bankruptcy was of this Date issued against them. 9th August, 1745.

The Bankrupts surrendered themselves under this Commission, in order to make a Discovery of their Estates and Effects, and were accordingly examined upon Oath, and deposed, " That the Books, Papers and Writings therein mentioned, &c. do contain a true and full Disclosure of all these Examnants Effects and Estates, real and personal, and how, and in what Manner, to whom, and upon what Consideration, and at what Time or Times they have disposed of, assigned or transferred any of their Goods, &c. and all Books, Writings and Papers relating thereto, of which these Examnants were possessed, or in, and to which they were any ways interested or intitled, or which any Person or Persons had, or hath, or have had in Trust for them, or for their Use, at any Time before or after the issuing the said Commission, or whereby these Examnants or their Families, have, or hath, or may have, or expect any Profit, Possibility of Profit, Benefit or Advantage whatever; and these Examnants further say, that they have delivered up all such Part of their Goods, &c. and all Books, Papers and Writings relative thereto, as now, at this Time of their Examination, they have, or are in their Possession, Custody or Power; and further say, that they have not removed, concealed or embezzled any of their Effects or Estates, real or personal, or any of their Books of Accompts, Papers, or Writings. 28th Sep. 1745.

“ Writings relating thereto, with an Intent to defraud their
“ Creditors.”

19th Nov. 1748. Such was the Import of the Oath emitted by these Partners, as appears from the certified Copy thereof: And from the like Copy of the Affidavits made by the Assignies under the Commission, of this Date, it appears, that they only received two Sums, amounting in whole to 2408 l. 0 s. 5 d. from the separate Estate of *John Blackwood*: And this they made Oath “ was all that they received on Account of the
“ Estate and Effects of the said Bankrupts, or either of them,
“ except some loose Papers, Books and Lumber that are useless, as the Examinant believes: And both these Examinants say, that the said several Sums of Money, so received by them as aforesaid, do belong to, and are Part of the
“ separate Estate of the said *John Blackwood*; and both these
“ Examinants, each speaking for himself, saith, *That they have*
“ *not received any Sum or Sums of Money, Goods or Effects, as,*
“ *or on Account of the separate Estate of the said John Cathcart,*
“ *or as, or on Account of the joint Estate of the said John Black-*
“ *wood and John Cathcart.*”

The aforesaid Sum which the Assignies recovered out of Mr. *Blackwood*'s separate Estate, they divided amongst the Creditors claiming under the Commission: And the Respondent acknowledges, that in November 1748, three Years after the Bankruptcy, he received 110 l. 19 s. 10 d. as the Dividend thereof falling to him. However, as it was believed, that the Bankrupts had made a just Discovery, they immediately after their Examination, obtained in Course a Certificate signed by the Commissioners, and Part of the *English* Creditors, but not by the Respondent. This Certificate bears,
“ That the Bankrupts, upon such their Examination, made
“ a full Discovery of their Estate and Effects, and in all Things
“ conformed themselves to the several Statutes made, and now
“ in Force concerning Bankrupts, and particularly according
“ to the Directions of the said Act, made in the 5th Year of his

M^r Lathcote
swears that he
received 7333.2.1/2
2 l. 1 s. 1 d.

" his present Majesty's Reign ; and there doth not appear to
" us any Reason or Doubt of the Truth of such Discovery, or that
" the same is not a full Discovery of all the Estate and Effects
" of the said John Blackwood and John Cathcart ;" Therefore
the Subscribers, being four Fifths of the Creditors, thereby
consent to the Bankrupts obtaining an Allowance, Benefit
and Discharge, in Terms of the said Statute. And no Cause
being shown to the contrary, the Lord High Chancellor, of
this Date, allowed and confirmed the said Certificate.

The two Partners having thus got the Benefit of the Law
of England, in Exclusion of their former Creditors, begun up-
on a new Footing, and the Petitioner has been many Years
ago re-established in a very flourishing Condition. He boasts
of having voluntarily paid 2479 l. to his former Creditors since
the Certificate, conform to a List produced ; but as he has
annexed no Dates to those Payments, tho' repeatedly required,
the Respondent has been unable to investigate the Circumstan-
ces of them. It however from thence appears, that his Af-
fairs must have been very soon repaired after his Bankruptcy,
by some other Means than his half Pay : For in August 1747,
within less than two Years of the Bankruptcy, he paid off the
Debt due to Thomas Kennedy, said to have affected his Lands
of Glendusk, and which including 80 l. thereof formerly paid
on his Account by Captain Robert Cathcart, amounted in whole
to 309 l. 18 s. 3 d. Sterling. Further, Several Articles in
his List are stated higher than they were at the Bankruptcy.
One Sum of 243 l. 13 s. is stated as paid to his Cousin Cap-
tain Robert Cathcart, altho' no such Debt was claimed and pro-
ved before the Commissioners. Again, William Richardson pro-
ved a Debt of 417 l. 18 s. 6 d. and drew a Dividend of 52 l.
3 s. 6 d. so that there remained 365 l. 5 s. yet the Petition-
er states as paid to him more in Part, 518 l. 11 s. 1 d. Last-
ly David Campbell the Petitioner's Nephew proved a Debt of
476 l. 1 s. 10 d. and received a Dividend of 59 l. 10 s. 2 d.
so that there remained 416 l. 11 s. 8 d. yet the Petitioner

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enter,

16th Nov.
1745.

*It necessary for
the Mr Cathcart
can condense
on the debts for
he knows nothing
of his being debt
nor is there any
order in process
for doing so*

*This now and
time must be
allow'd to be
informe*

enters in his List 588 *l.* 16 *s.* 4 *d.* as paid to him. How these Variations have happened, the Respondent knows not; but they at least show, that if such Sums were paid, the Petitioner became soon possessed of very large Funds: And that as far back as the 1750, he knew himself to be a rich Man, appears from another Fact that cannot be denied, namely, that this *David Campbell* his Nephew, who resided long at *Campeachy*, and there acquired a very handsome Fortune, having about that Year 1750, a Son born to him, the Petitioner then settled a voluntary Provision of 1000 *l. Sterling* on the Child; and if the Respondent is not greatly misinformed, the Petitioner is now in very opulent Circumstances.

But whatever was the Petitioner's Capacity and Inclination to pay off some of his former Creditors, certain it is, that he showed no Regard to the just and onerous Debt due the Respondent, nor would ever pay him one Farthing, tho' frequently solicited on that Account.

While Matters were in this Situation, the Respondent was accidentally informed, that the Petitioner was in Possession of the Lands of *Glendusk*, which had belonged to his Father, and which he had not surrendered to the Commissioners of Bankruptcy. The Respondent however did not proceed rashly on that Information, but took the Opinion of Council learned in the Law of *England*, and particularly of one Gentleman who had been a Commissioner of the Petitioner's Bankruptcy, and was advised, that a Concealment exceeding 100 *l. Sterling* would void the Effect of the Chancellor's Certificate, and entitle the Bankrupt's Creditors to sue them for full Payment of their Debts, as if such Certificate had never been obtained.

The Respondent thereupon brought his Action against the Petitioner in this Court, where it was undoubtedly competent, in respect of the Petitioner's having those Lands, as well as other Effects in this Country; and as the Respondent resided constantly here, it was in every View more convenient for him, than to bring an Action in the Courts of *Eng-*
land,

And Now

*That was left to
his Brother*

land, where his Business would not permit him to attend, and where it could not be supposed, that the Nature of Mr. Cathcart's Interest in those Lands, according to the Law of Scotland, could be equally well understood.

This Action was raised in April 1758, and proceeded on a Libel, concluding simply for Payment of the Debts before mentioned. The Petitioner compeared by his Council before the Lord Coalston Ordinary, and pleaded that a Statute of Bankruptcy having been issued against him, subsequent to his contracting the Debts libelled, and he having complied with all the Requisites of the Statutes relative to Bankrupts, obtained the Lord Chancellor's Certificate above mentioned, which, agreeable to the Statute of the 5th of his late Majesty, was a total Discharge of all such Debts formerly due by him. The Respondent answered, that the Certificate could not bar his Action, in respect that at and before Mr. Cathcart's Bankruptcy, he was possessed of, or had belonging to him, those Lands of Glendusk, which he did not surrender or discover to the Commissioners, but kept and still held the same, which imported a Voidance of the Certificate according to the said Statute, as being a Concealment exceeding the Value of 10 l.

In order to support his Defence, the Petitioner thought fit of himself to make an Affidavit before a Magistrate at London, bearing, " That upon his Examination before the Commissioners and Assignies of his Bankruptcy, he made a full Discovery of his whole Estate, real and personal, particularly of a Farm called Glendusk in Scotland, which was, at that Time, the only and all the real Estate he had or was intitled to; that the same Farm was seized upon by Thomas Kennedy for a Bond Debt, which the said John Blackwood and he the Deponent owed him: That it might be the Value of 10 l. per Year, and that the Produce of it, if sold, would not satisfy and pay the said Debt." The Petitioner also obtained an Affidavit from his late Partner John Blackwood, bearing,

*This may be true
that the Summons
was executed in
April 1758 at the
Petition of the Bank
Mr Cathcart was
not advised of it
till the end of
June 1758*

ing, " That he was present at the Examination of the said
" *John Cathcart*, and did hear him acquaint the Commissio-
" ners and Assignies, that he had a small Farm in *Scotland*,
" which was adjudged by the Law there, to one *Thomas Ken-*
" *neddy*, for a Sum larger than the Value of the said Estate or
" Farm ;" which the Petitioner did, in the Course of the
Process, estimate at 300 *l*.

After these Affidavits were produced, and founded on in
the Process, the Respondent discovered, upon Inspection of
Kennedy's Adjudication against the Petitioner, and a Search of
the Stent Books in *Edinburgh*, that the Petitioner had also be-
longing to him, before and at the Time of his Bankruptcy,
and still held, besides *Glendusk*, a House in *Edinburgh*, which,
it appeared from his voluntary Affidavit, he did in no Shape
surrender to the Commissioners. To make the Fact still more
clear, as appears from the Minutes, the Question was put to
his Council, " Whether or not he the Defender made any
" Sort of Surrender or Discovery of the House in question to
" the Commissioners?" To which it was answered, " That
" the Defender acknowledged he did not." Afterwards the
Petitioner made a further Admission in the Debate before
the Lord Ordinary, in these Words : " If the Pursuer thinks
" it for his Interest, he may no doubt adjudge this House up-
" on a special Charge against the Defender, as Heir to his
" Father." Accordingly the Respondent did adjudge the
House ; but lately another Creditor, instigated, as the Re-
spondent has Cause to apprehend, by the Petitioner, has en-
deavoured to deprive him of the greatest Part of this small
Subject, by likeways adjudging the same within the Year, for
a very large Debt.

After this Discovery of the House, the Cause was taken to
Report by the Lord Ordinary, but was put off by a Proof be-
ing appointed as to the Value of *Glendusk* ; and after that
Proof was taken, the whole was remitted to the Lord Ordi-
nary ; who at first pronounced an Interlocutor sustaining the
Defence,

Defence, founded on the Certificate. The Respondent preferred a Representation, and after Answers were given in, he, at a Calling, set forth the Matter of the Half-Pay, as another Article concealed, or not discovered to the Commissioners, which had hitherto escaped his Notice. The Lord Ordinary thereupon again took the Cause to report. Very full Informations were given in, and your Lordships were pleased, on the 17th of November last, to *repel the Defence on the Lord Chancellor's Certificate, and decern.*

Against this Interlocutor, pronounced with great Unanimity, Mr. Cathcart reclaimed; and as in his Petition, he, *inter alia*, craved a Diligence against Colin Mackay, for Recovery of any Letters or Writings which might give further Light into the Affair, the Respondent consented thereto. Mr. Mackay has been accordingly examined, and has produced two Letters, the one dated the 22d February, and the other 29th March 1757, said to be wrote by the Petitioner to the said Colin and John Mackays, both his Grand Nephews. This Production being seen by the Respondent, these Answers are humbly offered to the Petition.

The Petitioner has set out with, and repeatedly insisted upon, the Presumption in his Favour, drawn from the Circumstance of his having made large Payments to his Creditors, both before and since his Bankruptcy; as importing, that one who has acted such a Part, could not be capable of concealing such small Sums, as are condescended on, with an Intention to defraud them. To this it may be a sufficient Answer, joined to what has been already observed, that the Respondent's Plea is well founded in Law and Justice, supposing it were clear that the Petitioner had been guilty of no wilful or intentional Fraud. This the Respondent shall endeavour more fully to establish. But at any Rate, it is not from Presumptions or Conjectures that your Lordships will determine a Matter of Right, where there are Facts abundantly clear for deciding it. Supposing a Party to have the fairest Character,

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and

and to have done the most meritorious Actions in other Respects, yet that will not defend him against the legal Consequences of a Neglect or Transgression of the Law in any one Instance. Neither has the Petitioner so much Cause to boast in this Respect. The Payments before the Bankruptcy, he was bound, and could have been compelled to make; and as for those posterior to it, they are far from being equal to the Amount of his Debts, nor has he shown them to be nearly equal to his Abilities. Altho' the Certificate may be a legal Discharge, yet it surely does not take off the natural Obligation binding on every Man of Honour and Conscience to pay what he justly owed to his lawful Creditors. There are happily many Instances of Persons who have obtained the like Certificates, having afterwards paid the utmost Farthing of what they owed before their Bankruptcy; and without derogating from the Merit of the Payments already made by the Petitioner to others, it surely cannot be considered as properly hard or unequitable, (if there are legal Grounds for it,) to oblige the Petitioner to do the same Justice to the Respondent which he has voluntarily done to others, and which it cannot be denied he is in a full Capacity to do, if inclined.

The Respondent has condescended on three Subjects not surrendered by the Petitioner, upon all or one or other of which the Respondent concludes, that a Concealment has been made to the Extent of more than 10 l. which is sufficient to vacate the Certificate. These are, 1st, The Lands of *Glendusk*. 2^{dly}, The House in *Edinburgh*: And 3^{dly}, The Half Pay. The Petitioner takes no Notice of the *first* and *last*, because, as he is pleased to say, he understood your Lordships had no Difficulty as to either of them. The Respondent, however, can recollect nothing that passed to justify such an Apprehension; and altho' he does consider the Matter of the House to be the clearest and most undisputable Point, yet he apprehends his Plea receives additional Strength from the whole taken together.

The

The 1st Article that he shall treat of, as being the first that was discovered, is the Lands of *Glendusk*. As to them, it has been admitted by the Petitioner, that they belonged to his Father; upon whose Death, before the 1730, the Title to the Property thereof devolved upon the Petitioner, as his apparent Heir: That the Petitioner entered to the Possession by himself, and others, his Tenants, particularly, his Uncle *Robert Cathcart*, who possessed, in his Right, many Years, but without any Transmision of the Property to him, or any Intention to transmit it: And that the Petitioner's Interest in these Lands, having come to the Knowledge of *Thomas Kennedy*, a Creditor to him, and his Partner, in a Bond of 200*l*. *Kennedy* raised an Inhibition in the 1740, and obtained an Adjudication of the said Lands, and others, belonging to the Petitioner, in the 1742.

Such was the State of these Lands at the Time of the Bankruptcy, according to the Petitioner's own Admission. His Defence as to them is, that he gave a full Discovery of their Situation to the Commissioners, by acquainting them that he had such Lands, but that they were seized by *Kennedy*, for a Debt above their Value. This, however, only appears from his own, and his Partner's voluntary Affidavits, which the Respondent neither did, nor does admit to be legal Evidence of the Facts therein mentioned; especially, as the Proceedings of the Commissioners, and of the Assignies, are all taken down in Writing; and from these the Assignies make their Report, which they verify upon Oath. It is certain, nothing of this Discovery appears from the Affidavit of the Assignies, nor has the Petitioner even averred, that the same was entered in any of theirs, or the Commissioners Minutes. The Respondent, therefore, apprehends, that he is well intitled to maintain, that no Discovery whatever was made of these Lands.

But he shall suppose, for Argument Sake, that such a Discovery was made, as the Petitioner sets furth in his Affidavit, and

I. The Lands of Glendusk.

17 Jan'y 1761
Mr Blackwood
admitted the
Brothers affidavits
as true on
Specialie return
in L^d Exchequer
1761 No 44

and submits it to your Lordships, that it was not such as the Law required; and therefore, that the Petitioner can take no Benefit from it. For,

1^{mo}, Your Lordships will observe, that *Kennedy* never actually seized, or entered to the Possession of the Lands; and, altho' he adjudged the same, yet, as his Adjudication was led, without any special Charge given the Petitioner to enter Heir in the Lands, it was void and null. Such an Adjudication led against the Petitioner, an apparent Heir, who had made up no Titles, could not anyways affect the Lands, nor be good against the Petitioner himself, or any other Person whatever. If, therefore, the Matter had been fully discovered, and the Petitioner's Right to these Lands, together with the Nature of the Diligence, said to affect the same, been properly explained by the Petitioner, as ought to have been done, it is apparent, that the other Creditors must have totally set aside that Adjudication, and drawn their Shares of the Subject.

2^{do}, Supposing the Adjudication had been properly led, yet the Petitioner had unquestionably belonging to him, the Reversion of the Lands: And for ascertaining what might be the Value thereof, it was incumbent on the Petitioner, to have made a more full and explicate Discovery of the Circumstances of the Debt adjudged for, and of the Rental and Value of the Lands, that the Commissioners and Assignies might have been enabled to judge, whether it could be for the Interest of the other Creditors, to have the Lands brought to a Sale?

And, 3^{tio}, The Petitioner did not give a just Account of the Matter, when he said, that the Debt due to *Kennedy* exceeded the Value of the Lands. The Respondent will not here trouble your Lordships with entering upon the Proof that was adduced by Witneses, as to that Value. It was found impracticable to bring a Proof in that Way, by reason of the Lands not having been set in Tack, nor at any certain Rent, for above thirty Years past.

The

*It is further stated that
Kennedy collected
exceed a Month &
Dishes & bread
it is longer than
Cathcart made
part of want of
the Debt*

The Respondent shall take the Value of the Lands at the Petitioner's own Estimate of 300 *l.* Now, of *Kennedy's* Debt, it appears from his Assignment to the Petitioner, dated 20th August 1747, that 80 *l. Sterling* had been paid by Captain *Robert Cathcart*, for Account of the Petitioner, at two different Times, "In order to prevent *Kennedy's* entering upon Possession of the said Lands of *Glendusk*." The Assignment also bears, that the said 80 *l.* had been since repaid by the Petitioner, to the said Captain *Cathcart*, and that the Petitioner had then paid *Kennedy* 229 *l.* 18 *s.* 3 *d. Sterling*; which, with the 80 *l.* completely satisfied him of the principal Sum of 200 *l.* Annualrents and Expences. It is apparent, that if the said 80 *l.* was paid before the Bankruptcy, the Lands, at that Period, far exceeded the Value of the Debt due to *Kennedy*, and, consequently, there was a Concealment upon them, of near to that Sum of 80 *l.*

The Petitioner, indeed, produced a Bill, dated 1st March 1746, drawn by *Kennedy* upon Captain *Cathcart*, for 37 *l.* 10 *s. Sterling*, which he founded on, as Evidence, that so much of the Money was paid after the Bankruptcy. But, by a marking on the Back of the Bill, it appears, that 17 *l.* 10 *s.* of that Sum was due to *Kennedy*, for Wages, as Carpenter on Board Captain *Cathcart's* own Ship: And further, as *Kennedy* had no Title to draw a Bill upon Captain *Cathcart*, for a Debt due by the Petitioner, it cannot be presumed, when not otherwise instructed, that the Balance of 20 *l.* was drawn on the Petitioner's Account.

But, whether the whole 80 *l.* or only 60 *l.* was paid to *Kennedy* before the Bankruptcy, it is equally conclusive against the Petitioner. In a Missive of this Date, wrote by the Petitioner to the Respondent, after mentioning his having repaid Captain *Cathcart* the 80 *l.* the Petitioner adds, "I have had no open Account with him since the 1745," that is, from the Time of the Bankruptcy. This gives the strongest Reason to

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believe

*They are not
worth that sum
being but on simple
word of a subject
Superior*

13th Jan.
1758.

*Whether Captain
Cathcart is now
come to London
and cannot say
but he was not
last Summer*

believe, that the 80 *l.* had not only been paid to *Kennedy*, but repaid to Captain *Cathcart*, before the Bankruptcy. Moreover, what must conclude the Petitioner on this Article, is, that he falls to be possessed of *Kennedy's* Receipt, or Receipts to Captain *Cathcart*, which would be delivered up to him, when he cleared with the Captain. He has been repeatedly required, even under Protest, to produce such Receipts, but has never yet thought fit to produce any Receipt, or even a Declaration from Captain *Cathcart*, on this Point, altho' the Captain has been long in *London* since this Objection was made; neither has he so much as condescended on the precise Time that the Money was paid by Captain *Cathcart* to *Kennedy*, or repaid by him to the Captain. It must, therefore, be justly presumed, that so much of *Kennedy's* Debt was extinguished before the Bankruptcy, and, consequently, that the Lands did exceed what remained due of *Kennedy's* Debt, in about 80 *l.* or, at least, 60 *l. Sterling*.

II. The House
in Edinburgh,

The Respondent comes now to the Matter of the House in *Edinburgh*, of which the Petitioner has judicially acknowledged that he made no Sort of Surrender or Discovery to the Commissioners.

It is admitted by the Petitioner, that this House, which at and before the Time of the Bankruptcy, yielded 8 *l.* yearly of Rent, and has at different Periods since, yielded from six to eight Pounds *Sterling* of yearly Rent, belonged to his Father at his Death, and thereupon the Right to that Property unquestionably devolved on the Petitioner: And it will appear equally clear to your Lordships, that the same Right remained in the Petitioner at the Time of his Bankruptcy, and continued till the Subject was lately adjudged from him, as charged to enter Heir therein to his Father, at the Instance of the Respondent. Nor is the Evidence less pregnant of the Petitioner's having been in the natural Possession of this House, during the same Course of Years.

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The Petitioner has not ventured to contest directly, that the Title to the Property of this House stood in him at the Time of the Bankruptcy, but contends, that it is sufficiently instructed by Circumstances, that he had given over or become bound to denude of this House (which he holds equal) in Favour of his Sister Mrs. *Campbell*, in Respect that Part of her Portion remained unpaid at her Father's Death.

Your Lordships, however, will not take the Allegations of Parties for Evidence, and still less will Allegations be regarded, when redargued by Evidence. There is no Proof whatever, that any Part of Mrs. *Campbell*'s Portion was due to her at her Father's Death in 1729; nor is it at all credible, considering that she had been married to Mr. *Campbell* Minister at *Denoon*, above 30 Years before that Period. The Petitioner says, that he on that Occasion wrote her a Letter, desiring her to take this House, and sell it or keep it as she pleased; but it is acknowledged no such Letter is produced: Nor is the Excuse for the Want of it true, in Fact, that Mrs. *Campbell* was dead before this Action was brought; for there is a Certificate produced, bearing, that the Presbytery of *Denoon* reported to the Trustees for managing the Widows Fund, that Mrs. *Campbell* died in October 1758, and your Lordships have heard that this Action was commenced in April 1758: Indeed had any such Letter ever existed, it cannot be doubted that Mrs. *Campbell* would have carefully preserved it, and that it would have fallen into her Daughter or Grandson's Custody, upon her Decease.

Her constant Possession of the Rents of the House, can infer no Right in her to the Property, nor any Obligation upon the Petitioner to convey it, when it appears she drew those Rents in Right of the Petitioner, and upon a Factory from him. As to what Doctor *Wishart* depones concerning his advising Mrs. *Campbell* to sell the House, it appears from the Terms of his Oath, to have happened long after the Bankruptcy, and can be carried no further than as importing a

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*It is already
rehearsal that Mrs
Cathcart heard
nothing of the
process till June
or July 1758 &
the answer was
given that she
died in October
1758 It is in
formed that Mrs
Campbell's Son
or Daughter found
all the mother's
Letters as useless*

[10]

Scheme of selling the House, if the Petitioner, the Proprietor, thought fit. And with this is to be considered the new Production made by *Colin Mackay*, Mrs. *Campbell's* Grandson, since the reclaiming Petition was presented. It consists, as already noticed, of two Letters bearing to be signed by the Petitioner, and addressed on the Foot of each to his Nephews, *John* and *Colin Mackays*, but without any Direction on the Back. In the first, dated 22d *February* 1757, there is this Passage, "My kind Love to my Sister, and tell her, that I think she should write pressing to Mr. *Wishart* to sell the House at *Edinburgh*, for any Money it will fetch, for it is not worth keeping." And in the other, dated 29th *March* 1757, he says, "I think my Sister had better keep the House than sell it, considering what Mr. *Wishart* writes her." These Letters are wrote twelve Years after the Bankruptcy, and just on the Eve of the Commencement of this Action: At the utmost, they can import no more, than that the Petitioner, who had then again become a rich Man, was willing to sell his House for his Sister's Behoof, but can neither import that he was *ab ante* divested of the Right to it, or had come under any previous Obligation to that Effect.

Further, the Petitioner has said, That after Mrs. *Campbell's* Death, when *Colin Mackay*, her Grandson, wrote to him on the Subject of this House, his Answer was, "That he had given up all Right to it to his Sister many Years ago; and as *Colin's* Mother was the only Child she left, she might do with it what she pleased." This Answer is said to have been made before the Petitioner had the least Knowledge of the Challenge brought by the Respondent upon the Subject of this House. Your Lordships might be here led to suppose, that the above Passage as cited in the Petition was taken from the Letter said to be wrote by the Petitioner to *Colin Mackay*; but there is truly no such Letter produced, nor any Evidence that it ever existed. There is nothing appears further, than a Letter from the Petitioner to Doctor *Wishart*, dated 17th

*I'll Colin Mackay
come to Edinburgh
the Diligence Mr
Cathcart's Son
did not know
there was another Brother and that is Brother is in the army now
at Belisle in the British Service*

February 1759, upon the Subject of the new Challenge which the Respondent had then made, respecting this very House; and there indeed, the Petitioner does, by way of Excuse for himself, in not surrendering the House, alledge, *inter alia*, that he had made such an Answer to *Colin Mackay*. The Respondent is perfectly satisfied that this would have been so stated in the Petition, had it been explained or occurred to the Petitioner's Council; but even supposing the Petitioner had made such an Answer to *Mackay* in the 1758, it could surely have been no Evidence of the Fact, that he had truly divested himself of this House, before his Bankruptcy in the 1745.

Your Lordships will now, on the other Hand, consider the Evidence which the Respondent has adduced, for proving, that altho' the Petitioner gave the Rents of this House for his Sister's Maintenance, yet both the Title to the Property, and the Possession of the Subject was held by him long before, at the Time of, and after the Bankruptcy; and that he must have necessarily known or understood his Right of Property, and Interest therein.

In the first Place, it appears, that Mr. *Alexander Macmillan*, who had been Factor for the Petitioner's Father, uplifted the Rents of this House by the Petitioner's Authority, from the 1729, to the 1739: Altho' there is no written Factory recovered, yet it is manifest he could have collected the Rents by Commission from no other Person. Further, the Fact is established by sundry Receipts recovered from the Tenants during that Period: The earliest of these Receipts is in these Words: "I Dec. 9th, 1736.
" *Alexander Macmillan, &c. as having Commission from Mr.*
" *John Cathcart, Merchant in London, grant me to have re-*
" *ceived from Mr. William Harper the Sum of 12 l. Sterling,*
" *as a Year and a Half's Rent, viz. from Whitfunday 1735,*
" *to Martinmas 1736, of a House in Fowlis's Close, Top Sto-*
" *ry of the Fore-street, East Side, belonging to the said John*
" *Cathcart; and therefore, I hereby, as Factor for the said John*
" *Cathcart, discharge the said Mr. Harper, &c. and I oblige*
" *my Constituent to warrant these Presents.*"

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2do, There

Sept. 24th,
1739.

[18]
2^{do}, There is a Letter from the Petitioner to his Sister Mrs. Campbell, wherein he writes, "I doubt not but Mr. Macmillan remits you the Rents of the House in *Edinburgh*, as I desired him; which, in the mean time, is all I can do for you, &c." And there is a Receipt under Mrs. Campbell's Hand about that Time, acknowledging her to have received by Doctor Wishart, whom Mr. Macmillan employed to make the Remittance, the Sum of 7*l.* 7*s.* Sterling, completing one Year's Rent, as the Receipt bears, "of my Brother John Cathcart's House in *Edinburgh*, which Rent is allowed by him to me."

Thus your Lordships have the Petitioner himself, Mr. Macmillan his Factor, and his Sister Mrs. Campbell, all owning and declaring, under their Hands, the House to belong to the Petitioner, and the Rents to have been levied in his Name, and aplyed by his Direction for his Sister's Aliment.

3^{tio}, Doctor Wishart has deponed, that to the best of his Remembrance he uplifted the Rents from the 1740, to the 1744, by Virtue of a Missive from the Petitioner, tho' upon looking over his Papers, he cannot find such Letter; and during that Period, the Rents were also remitted to Mrs. Campbell, which must have been by the Petitioner's Direction.

And, lastly, What is conclusive on this Point, is the following ample Factory, holograph of the Petitioner himself, granted to Doctor Wishart within less than a Year before the Commission of Bankruptcy was issued.

August 22d,
1744.

"I John Cathcart of *London*, Merchant, being fully convinced of the Honesty and Capacity of the Reverend Mr. George Wishart Minister of the Gospel in *Edinburgh*, do hereby constitute and appoint him, my sole and lawful Factor for the Rents of all my Houses, Tenements, &c. belonging to me, within the City of *Edinburgh*, and Liberties thereof, with full Power, not only to uplift the said Rents, but to grant Discharges for the same, &c. as amply as I myself could do. And likewise, I hereby ordain and appoint him, the said Reverend Mr. George Wishart, to pay the Rents and Profits arising from the said Houses and others, to Mrs. Campbell Relict of, &c. my lawful Sister, for sun-

"dry

“dry Reasons thereunto me moving. Declaring always, &c.
“That a Discharge or Receipt from the said Mrs. Campbell
“for the Rents uplifted by the said Reverend Mr. George
“Wishart, shall be as valid to all Intents and Purposes for his
“Exoneration, as if I myself had granted the same: Hereby
“declaring, That the said Mrs. Campbell her Receipts, shall
“always be a full Exoneration to the said Reverend Mr.
“George Wishart of all Rents of the said Subject which he
“has intromitted with, preceeding this Date, &c.”

At the Time this Factory was granted, the Title-deeds of the House were in Mr. Macmillan's Hands, with whom they remained till they were delivered up to Mr. Hunter, the Petitioner's present Agent, by his Order. Had the Petitioner intended to have made over the House to his Sister, it would surely have been much easier for him to have ordered a Disposition to have been made out in her Favour, than to have wrote this long Factory with his own Hand: But no such Disposition was ever granted, or appears to have been ever thought of. And in Pursuance of this Factory, Doctor Wishart depones, he uplifted and applied the Rents till the 1759, being after the Commencement of this Process: His Receipts to the Tenants do uniformly bear to be granted by him, as Factor for Mr. Cathcart; and likeways, constantly describe the House, as belonging to the said John Cathcart.

Upon the whole, it is evident that the Property and Possession of this House belonged to, and was held by the Petitioner at, and preceeding the Time of his Bankruptcy. No Disposition or Conveyance of the Property ever was granted to his Sister: No Obligation, or even Promise to dispoise in her Favours, is attempted to be proven. It surpasses all Credibility, that the Defender, who had resided long in this Country, was a Native of Scotland, and had carried on Trade there for many Years, could imagine that his applying his own Rents, during Pleasure, to the Support of his needy Relation, should denude him of the Subject itself, out of which the Rents are produced: *Ignorantia juris* is not pleadable; but considering the Factory and other Vouchers above stated, there is no Room left for pretending Ignorance of any Kind.

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They were not
delivered to the
Dor for Mr. Cathcart
can't say for as he
remembers
Mr. Cathcart
had got the papers
to do so, such a
possession through
he had known it
was necessary

Supposing the Defender may have intended to make a Compliment of this House to his Sister, it could not avail him, as still he had not executed that Intention, nor become effectually bound to do so: Neither, indeed, is it consistent with Probability, that he truly did intend it, considering, that for such a Course of Years, no Deed or Writing that had the smallest Tendency that Way was granted. In fine, as this House undoubtedly belonged to the Petitioner, it unquestionably ought to have been surrendered or discovered by him.

III. The
half Pay.

The third Discovery which the Respondent made, is the Petitioner's half Pay. Upon the 28th of *September* 1745, the Date of his final Examination, it is acknowledged there was an Arrear due to him of 48 *l. Sterling*, for 96 Days, at 10 *s. per Diem*: Of this Arrear, and of his half Pay in Time coming, amounting to 182 *l. Sterling per annum*, it is confessed, no Notice was taken to the Commissioners: The Excuse made, is, that the Petitioner was not bound to surrender it, as arising from a military Office, the Pay whereof is not attachable by Creditors. The general Rule of Law is clear for the Respondent, that all Subjects belonging to a Debtor ought to be attachable by his Creditors; and therefore, it is incumbent on the Petitioner to prove that this half Pay is exeemed, which he has not yet done. The Office of Director of the Hospitals is not more a military Office than that of a Commissary: It gives no Title to half Pay, so that the Petitioner's Grant of it was a mere Favour like any other Pension; and even supposing the same to have been alimentary, as to Time coming, yet the Arrears, which had run up to a considerable Sum, were truly a Debt resting to him, and assignable at his Pleasure. At any Rate, it is certainly unlucky for the Petitioner, that in this, as well as all the other Articles, he assumed the Power of judging for himself in his own Cause; and, instead of submitting, as he ought to have done, the whole Facts to his Commissioners, stood silent, and relied entirely on his own partial Opinion, tho' now proved greatly prejudicial to the Interest of his lawful Creditors.

Having thus canvassed the several Articles of Concealment in Dispute, the Respondent will conclude with some Observations

tions on the Petitioner's general Defence; that in order to vacate the Certificate, the Creditor must prove, that the Concealment was made of *Intent to defraud*.

The Respondent humbly apprehends, that a satisfying Answer to the Petitioner's whole Argument, arises from the plain Words of the Statute itself, (the 5th of his late Majesty;) which provides, that if a Bankrupt obtains the Lord Chancellor's Certificate as therein directed, he shall be discharged of his prior Debts; and if sued for the same, "a Verdict shall pass for the Defendant, unless the Plaintiff in such Action can prove, the said Certificate was obtained *unfairly* and by *Fraud*; OR, unless the Plaintiff in such Action can make appear *any Concealment* by such Bankrupt, to the Value of 10 l." Here there is a distinct Alternative by the Particle OR; the Certificate is vacated, either if the Creditor can prove it to have been obtained *unfairly* and by *Fraud*, OR can make appear *any Concealment* to the Value of 10 l. Had the Legislature meant, that the Concealment should have been proved *wilfully fraudulent*, it would certainly have been so expressed. But, on the contrary, the Legislature has put the Evidence of the Concealment in Contra-distinction to that of Fraud. As Fraud arises *ex animi intentione*, a Proof of it must be extremely difficult in many Cases, and often impracticable: The Legislature, therefore, either meant, that such Fraud should be presumed, where the Value of the Subject not surrendered exceeds 10 l. or that the Voidance of the legal Discharge should be imposed, where the Bankrupt by his Negligence had omitted to discover such a considerable Fund for Satisfaction of his just Debts. There was obviously no Occasion to mention a Concealment of this particular Extent, if it could not avail to void the Certificate, unless *fraudulently* done; because Frauds and unfair Practices to any Extent, small or great, are separately declared to be a Ground for vacating the Certificate. Indeed, from the whole of the Statute, it is plain, that these merited a very different Consideration.

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Thus,

Thus, the Act specially requires, that the Bankrupt shall upon Oath, fully and truly disclose and discover " All his Effects and Estate, real and personal, and how and in what Manner, &c. he had disposed of any of his Estate, &c. and all Books and Writings relating thereto, or of which he is possessed, or in and to which he was any Ways interested, or intitled; or whereby he or his Family had, or might have, or expect any Profit, Possibility of Profit, Benefit, or Advantage whatever, &c." These Words as clearly as possible, declare the Intention of the Legislature, that nothing should escape the Notice of the Bankrupt; or that if it did to the Extent of 10 l. he should not receive the Benefit of the Statute. It is not thereby meant, that the Bankrupt should set forth every Transaction of his past Life, further than may be connected with the Circumstances of his Bankruptcy: But it certainly imports, that he shall fully disclose every Subject in which he has a legal Interest at the Time, or from which he or his Family, and consequently his Creditors, may even have a Possibility of Profit or Advantage; and such undoubtedly were the Subjects now under your Lordships Consideration. The Law does not leave the Bankrupt at Liberty to judge for himself, or rather for his Creditors, of the State of such Subjects, or of the Import of Questions that may arise at Law concerning them. He is fairly and honestly to disclose the whole Facts, be the Consequence what it will.

And your Lordships will observe, that that Part of the Bankrupt's Oath, bearing, that he has not concealed or embezzled any of his Effects, or any of his Books, Papers, &c. relative thereto, *with an Intent to defraud his Creditors*, does not at all derogate from the other Part of the Oath, bearing *affirmative*, that he has made a *full Discovery* of all he is possessed of, or intitled to: That Negative is properly applicable to a separate Proviso of the Statute, " That, in case he shall conceal, or embezzle his Estate to the Value of 20 l. or any Books

“ Books or Writings relating thereto, with Intent to defraud
“ his Creditors, he shall, upon Conviction, be deemed guilty
“ of *Felony*, without Benefit of Clergy.” So justly has the
Legislature considered the heinous Guilt attending the Com-
mission of a wilful Fraud, that it has made it punishable by
Death; which strongly corroborates the Respondent’s Con-
struction of the other Clause in the Statute, that a Conceal-
ment, or not Discovery, tho’ not fraudulent, should vacate
the Discharge.

The Petitioner would have the Voidance of his Certificate
be considered as a Penalty on the Bankrupt. But this, with
Submission, is altogether erroneous. Debts justly constitute,
would for ever remain binding on the Debtor, unless paid, or
prescrib’d; and the Multitude of them would never lessen his
Obligation for each. The Legislature, therefore, commise-
rating the unhappy State of those, who, through Misfortunes,
have become Bankrupt, has provided equitable Means for
their Relief. In *Scotland*, it has gone no further than a per-
sonal Protection from Diligence, upon a Surrender of all the
Bankrupt’s Effects to his Creditors: But, in *England*, he ob-
tains a total Discharge, and even some Share of his Effects,
if he strictly complies with the Requisites of the Law, parti-
cularly, by making a full Surrender to his Creditors. In losing
the Benefit of the Certificate, therefore, the Bankrupt incurs
no *Penalty*, but only fails to get a *Benefit* or *Advantage* thro’
his own Fault, or Neglect. The Certificate itself bears, that
the Creditors consented to his Discharge, upon the Faith that
he had made a *full Discovery*, and that he had nothing more
in the World to give them. But, when it now appears, that
he then was, and still is vested in the Property of considerable
Subjects known to himself, and which, confessedly, he ought
to have surrendered, the Condition of the Certificate fails, and
the Respondent, and his other Creditors ought, in Justice and
Equity, to be put in the same State, as if that Discharge
had not been granted.

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Your Lordships will at once foresee the dangerous Consequences that must attend any other Construction of the Statute than the Respondent has endeavoured to maintain. It would be an easy Matter, otherways, for a Bankrupt to conceal the greatest Part of his Effects, and yet have a Plan laid for such Excuses, as, in case of Detection, might take off the least Appearance of Fraud. Mankind cannot dive into the Hearts of each other, and, therefore, are intitled to provide against the Commission of Frauds in particular Cases, which it might otherways be impossible to prove. The *English* Statute of the 21. *James I. Cap. 19.* expressly directs, " That the Statutes relating to Bankrupts, shall be construed in the most beneficial Manner for Creditors:" Which is a Rule that must be considered as extending to all future Statutes, since it is consistent with Reason and Justice. Yet the Petitioner's Construction of this late Statute, were it received, might convert an Act, intended for encouraging unfortunate Bankrupts to do Justice to their Creditors, as far as they are able, into a Snare, whereby the most fraudulent Bankrupts might intrap their Creditors, and find Means, with Impunity, to possess those Subjects, which, in Law and Justice, belong to them.

The Respondent has no Inclination to carry his Plea further than is necessary, or to charge the Petitioner with a wilful Fraud, if he can prevail on easier Grounds: But he must observe, that were it necessary, he thinks he could well maintain, that there are here Circumstances sufficient to instruct a *legal* Fraud, if not likewise a *moral* one. The Ignorance which the Petitioner pleads in his Excuse, particularly as to the House, is so gross, as no Man of any Business or Experience in Life, far less a Man of the Petitioner's Abilities can be supposed capable of; and his whole Story is involved in Inconsistencies that cannot be reconciled: But in fine, (to use the Words of a late eminent Council, as the Respondent can find none so expressive) in his humble Apprehension, here " no Proof is requisite of a wilful or fraudulent Intention of
" the

" the Bankrupt to conceal ; it is enough, that he did not disclose, to whatever Motive owing."

The Petitioner has concluded his Petition with craving to be allowed Compensation on a promissory Note of the Respondent's, for 48 *l.* 1 *s.* 7 *d.* *Sterling*, and the Balance of an open Accompt since 1758. The Respondent agrees, that the Contents of the Note shall be allowed in Part of the Debts due him, and also the Balance of the Accompt, which only amounts to a few Shillings.

Lastly, As to the Conclusion of the Libel for 150 *l.* in Name of Damages and Expences, it is what is customary in every Case, tho' no Doubt subject to your Lordships Restriction: The Respondent submits it to your Lordships, whether he is not at least intitled to be re-imburfed of his Expences; and he hopes the Length of Time, that such a large Debt has been with-held from him, and the great Charge and Trouble he has been put to in investigating the Petitioner's Concealments, both here and at *London*, will be taken under your Lordships Consideration.

In Respect whereof, &c.

D A V. R A E.

